

**KFS Excavating, Inc. and International Union of
Operating Engineers, Local 324, AFL-CIO.**
Case 7-CA-37062

September 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN
AND TRUESDALE

Upon a charge filed by the Union on April 5, 1995, the General Counsel of the National Labor Relations Board issued a complaint on May 31, 1995, against KFS Excavating, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On August 24, 1995, the General Counsel filed a Motion for Default Summary Judgment with the Board. On August 28, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Default Summary Judgment disclose that the Region, by letter dated June 23, 1995, notified the Respondent that unless an answer were received by July 7, 1995, a Motion for Default Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Ortonville, Michigan, has been engaged in the building and construction industry as an underground construction and excavating contractor providing services at various jobsites in the State of Michigan. During the year end-

ing December 31, 1994, the Respondent, in conducting its business operations, purchased and received goods and materials valued in excess of \$50,000 which were shipped to and received at its Ortonville facility and at various Michigan jobsites directly from points outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All operators employed by the Respondent at its jobsites in Michigan; but excluding office-clerical employees, salesmen, watchmen, guards, supervisors as defined in the Act and all other employees.

On August 14, 1992, the Respondent entered into an agreement whereby it agreed to be bound by all terms and conditions, including payment of all fringe benefits as set forth in an existing collective-bargaining agreement between the Union and the Associated Underground Contractors, Inc. (AUC) and agreed to be bound to subsequent agreements between the Union and the AUC unless timely notice to terminate the agreement was given. On August 14, 1992, the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the Respondent's unit employees without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective for the period September 5, 1994, to September 1, 1997. For the period from August 14, 1992, to September 1, 1997, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.

The collective-bargaining agreement between the Union and the AUC provides, inter alia, that each employer bound thereby shall make regular monthly contributions and reports to the Union's fringe benefit funds for work performed by its employees covered by the agreement, for purposes of certain insurance, pension, and other benefits for the employees, shall pay certain amounts as collection costs for untimely contributions, and shall permit the trustees of the fringe benefit funds or their authorized agents to perform an audit of such books and records necessary to verify the

accuracy of the Employer's fringe benefit contributions.

Since October 5, 1994, and continuing to date, the Respondent unilaterally and without notice to the Union has failed to make contributions on behalf of the unit employees to the fringe benefit funds as provided for in the collective-bargaining agreement.

Since October 5, 1994, and continuing to date, an agent of the Union's fringe benefit funds has requested to perform an audit of the Respondent's payroll records and other books and records to determine the Respondent's extent of compliance with the fringe benefit contribution provisions of the collective-bargaining agreement. Since about the same date, the Respondent has refused to allow an agent of the Union's fringe benefit funds to conduct an audit as described above.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has unilaterally modified the current collective-bargaining agreement without the consent of the Union and without complying with Section 8(d) of the Act, has been failing and refusing to bargain collectively and in good faith with the limited exclusive bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing since October 5, 1994, to make contractually required contributions to the fringe benefit funds, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹

¹ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the

Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

ORDER

The National Labor Relations Board orders that the Respondent, KFS Excavating, Inc., Ortonville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally or without notice to the Union, failing to make contributions on behalf of the unit employees to the fringe benefit funds as provided for in the collective-bargaining agreement with the Associated Underground Contractors, Inc., the most recent of which is effective for the period September 5, 1994, to September 1, 1997. The unit includes the following employees:

All operators employed by the Respondent at its jobsites in Michigan; but excluding office-clerical employees, salesmen, watchmen, guards, supervisors as defined in the Act and all other employees.

(b) Refusing to allow an agent of the Union's fringe benefit funds to conduct an audit as provided for in the collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its unit employees for any loss of benefits or expenses ensuing from its failure to make contractually required contributions to the various fringe benefit funds since October 5, 1994, as set forth in the remedy section of this Decision.

(b) Allow an agent of the fringe benefit funds of International Union of Operating Engineers, Local 324, AFL-CIO to conduct an audit of the Respondent's payroll records and other books and records to determine the extent of the Respondent's compliance with the fringe benefit contribution provisions of the collective-bargaining agreement.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-

cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Ortonville, Michigan, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally or without notice to the Union, fail to make contributions on behalf of the unit employees to the fringe benefit funds as provided for in the collective-bargaining agreement with the Associated Underground Contractors, Inc., the most recent of which is effective for the period September 5, 1994, to September 1, 1997. The unit includes the following employees:

All operators employed by us at our jobsites in Michigan; but excluding office-clerical employees, salesmen, watchmen, guards, supervisors as defined in the Act and all other employees.

WE WILL NOT refuse to allow an agent of the Union's fringe benefit funds to conduct an audit as provided for in the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole our unit employees for any loss of benefits or expenses ensuing from our failure to make contractually required contributions to the various fringe benefit funds since October 5, 1994.

WE WILL allow an agent of the fringe benefit funds of International Union of Operating Engineers, Local 324, AFL-CIO to conduct an audit of our payroll records and other books and records to determine the extent of our compliance with the fringe benefit contribution provisions of the collective-bargaining agreement.

KFS EXCAVATING, INC.